

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETER HERNANDEZ,

Appellant,

vs.

LAWRENCE E. WILSON, Warden
California State Prison,
San Quentin, California, et al.)

Appellee.

No. 20874

APPELLEE'S BRIEF

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APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

On November 19, 1963, appellant, Peter Hernandez, was convicted in the Superior Court of Los Angeles County,

California, in action No. 274944, upon his plea of guilty while represented by counsel, of the felony offense of possession of narcotics in violation of California Health and Safety Code section 11500. He was sentenced on that same date to imprisonment in the state prison for the term prescribed by law.

Appellant did not appeal the above conviction. Rather, he filed a petition for a writ of habeas corpus (No. 41849) in the Superior Court of Marin County, California. That petition was denied without hearing on December 30, 1964. Thereafter, appellant filed a similar habeas corpus petition (No. Crim. 9400) in the California Supreme Court, which also was denied without hearing on October 7, 1965. Substantially the same factual and legal issues now presented to this Court were raised in those petitions.

B. Proceedings in the Federal Courts

On February 2, 1966, appellant filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division (CT 1, 31). On that same date, an order by Judge Wollenberg of that court denying the petition was filed (CT 17, 31).

On February 25, 1966, an order was issued by Judge Wollenberg granting appellant's application for a certificate of probable cause and allowing him to appeal in forma pauperis

(CT 26, 31). A notice of appeal was filed thereafter by appellant on March 17, 1966 (CT 27, 31).

SUMMARY OF APPELLEE'S ARGUMENT

Appellant's voluntary plea of guilty prevents collateral attack upon his judgment of conviction on the asserted ground of ineffective representation by counsel at his preliminary hearing. Furthermore, the alleged inadequacies in this regard do not raise a federal question.

ARGUMENT

APPELLANT'S VOLUNTARY PLEA OF GUILTY PREVENTS COLLATERAL ATTACK UPON HIS JUDGMENT OF CONVICTION ON THE ASSERTED GROUND OF INEFFECTIVE REPRESENTATION BY COUNSEL AT HIS PRELIMINARY HEARING. FURTHERMORE, THE ALLEGED INADEQUACIES IN THIS REGARD DO NOT RAISE A FEDERAL QUESTION.

Appellant states that he had retained private counsel to assist him in his defense against the criminal charge which ultimately led to the California state court conviction presently under attack. According to appellant, at the time of his state court preliminary examination, he informed the court that his attorney would be unable to be present and requested that the matter be continued. Allegedly this motion was denied and a deputy public defender was appointed to represent appellant at the preliminary examination. Some time later, with his own attorney present then, appellant entered a plea of guilty and was ultimately

sentenced to California State Prison. Appellant contends that his Sixth and Fourteenth Amendment rights were violated when the court declined the aforementioned motion for a continuance.

Initially, we should stress the propriety of the District Court's denial of appellant's petition without having ordered a hearing because his allegations, even if true, would not justify the issuance of a writ of habeas corpus. As will be shown, this is so as a matter of law. In such a situation, the need for a federal hearing is obviated. Chavez v. Dickson, 280 F.2d 727, 734-35 & n. 15 (9th Cir. 1960). And see Townsend v. Sain, 372 U.S. 293, 312 (1963); Brown v. Allen, 344 U.S. 443, 463-65, 506-07 (1953); United States v. Pate, 345 F.2d 691, 696 (7th Cir. 1965); Kerrigan v. Scafati, 348 F.2d 187, 188-89 (1st Cir. 1965).

Because of appellant's guilty plea, his conviction is invulnerable to attack on the basis of the quality of his representation by counsel at his preliminary examination. Edwards v. United States, 256 F.2d 707 (D.C. Cir. 1958). His conviction rests solely upon that voluntary plea entered upon the advice of privately retained counsel and not upon what may have transpired earlier at the preliminary hearing. Townsend v. Burke, 334 U.S. 736 (1948); Wallace v. Heinze,

351 F.2d 39 (9th Cir. 1965); Davis v. United States, 347 F.2d 374 (9th Cir. 1965); Harris v. United States, 338 F.2d 75 (9th Cir. 1964); In re Seiterle, 61 Cal.2d 651, 39 Cal.Rptr. 716, 394 P.2d 556 (1964).

Under California law an accused is entitled to be represented by counsel at his preliminary examination (Cal. Pen. Code § 859), and if denied such representation, an accused can set aside the information and void the proceedings taken at his preliminary examination. See Cal. Pen. Code § 995; People v. Diaz, 206 Cal.App.2d 651, 659, 661, 24 Cal. Rptr. 367, 371, 372 (1962). However, appellant chose not to avail himself of this state court procedure. Thus even if his decision to plead guilty was influenced by the allegedly improper substitution of counsel, a possibility which we find most incredible, such would not be a basis for this belated attempt to upset the conviction. Cf. Smith v. United States, 347 F.2d 505 (7th Cir. 1965); Harris v. United States, 338 F.2d 75, 80 (9th Cir. 1964); Thomas v. United States, 290 F.2d 696, 697 (9th Cir. 1961).

Furthermore, petitioner obviously confuses a preliminary hearing with a trial. The purpose of the preliminary hearing in California is to determine whether there is sufficient evidence upon which an accused may be prosecuted. Emphatically it is not a trial where guilt or innocence is

determined. Nor is it, "in and of itself, a critical stage in the judicial proceedings such as to constitutionally require the appointment of counsel." Wilson v. Harris, 351 F.2d 840, 844 (9th Cir. 1965). In the instant case, appellant does not specify how, in any way, he was prejudiced by the incident at his preliminary examination of which he complains. Clearly, then he has failed to raise a federal question.

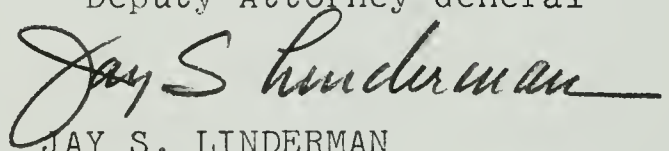
CONCLUSION

For the foregoing reasons, appellee submits that the order of the District Court should be affirmed and the proceedings herein dismissed.

DATED: June 13, 1966

THOMAS C. LYNCH, Attorney General
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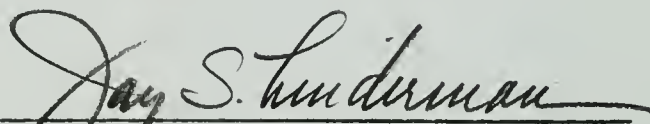
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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: June 13, 1966



JAY S. LINDERMAN
Deputy Attorney General